IN THE EXCHEQUER COURT OF CANADA.

1919
August 29.

FREDERICK JOHN BEHARRIELL,
SUPPLIANT;

v.

HIS MAJESTY THE KING,
RESPONDENT.

Expropriation—Valuation of commercial enterprise.

Suppliant alleged that the sand and clay to be found on the property expropriated had special quality and merit for manufacture of high-class brick and brick-tile, and, that with the small quantity of land left to him after the expropriation of the property it was impossible to carry on his proposed enterprise.

The suppliant became owner of the property in 1912, paying $10.00 an acre; the Crown offered $30.00 an acre, and it was admitted that this amount was ample if there was no special merit in the clay. He never commercialized it, there has been no established business on the premises and the supposed profits are conjectural. The suppliant in sending material to experts for test did not deem it necessary to send clay, but sent sand *alone*. The land taken is but a small piece of the whole, the Crown having abandoned part of the land first expropriated and agreed to reconvey the part taken by the Canadian Northern, and moreover, the land is to a certain extent swamp land not suitable for the alleged purposes, and other clay is available in the vicinity.

Held.—That, in as much as there was no special or peculiar merit in the clay and sand found on the expropriated land, and furthermore that, as suppliant has suffered no injury to any feasible commercial undertaking, by reason of the amount of land taken or of the works constructed by respondent, there was no ground for increasing the amount of compensation tendered to suppliant by respondent.

PETITION OF RIGHT to recover the alleged value of land expropriated by the Crown and claiming special damages because of the valuable deposits of sand and clay on the property expropriated suitable for manufacture of very high class brick and analogous articles and also because the lands so taken were of such extent and so situate

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with regard to the remainder that the lands were rendered of no value for the purposes for which the suppliant intended them.

The case was first tried at Toronto on January 15 and 16, 1917, but before judgment the Crown abandoned certain portions of the land previously expropriated and subsequently made application for new trial on the ground of surprise at the former trial, and because the abandonment entirely changed the nature of the action. This application was granted and a new trial was had on January 14, 15, 16, 17, 18, and April 29 and 30, 1919, before the Honourable Sir Walter Cassels at Toronto.

The respondent tendered $30 an acre before action, and in its defence renews the same.

At the opening, suppliant asked and was permitted to amend by reducing his claim to $100,000. A great deal of evidence was adduced, but the essential points in issue were 1st, whether the clay and sand in the property in question had any special or peculiar merit for the making of brick or brick-tile; and 2nd, whether the taking of the piece expropriated by the Crown prevented the suppliant from carrying on the enterprise or undertaking he alleged he intended to do.

The main facts are discussed in the reasons for judgment.

W. C. Mackay, K.C., and *W. R. Wadsworth,* K.C., for suppliant.

Hugh Guthrie, K.C., and *R. V. Sinclair,* K.C., for respondent.

CASSELS, J. (August 29, 1919) delivered judgment.

On March 24, 1916, Beharriell, the suppliant, filed a petition in which he claimed that on Septem-

ber 28, 1912, he entered into an agreement for the purchase of the westerly 50 acres of the east half of Lot No. 11, in the 14th concession of the Township of N. Orillia, and that on November 21, 1912, he obtained a conveyance of the said lands.

There is no dispute as to the title of the suppliant. It is conceded that when the suppliant became the owner of the said lands the line of railway of the Canadian Northern crossed the said 50 acres and was in operation as a railway.

The Canadian Northern Railway had expropriated 7.25 acres of the said 50 acres, and Beharriell's title to the 50 acres was less the property of the Canadian Northern, reducing the title of the suppliant to 42.75 acres instead of 50 acres as alleged.

The lands of the suppliant are at Washago about eleven miles from the Town of Orillia, and about 89 miles from Toronto.

The suppliant alleges that for the purpose of a Public Work of Canada, *viz.*, the Trent Canal, His Majesty on August 13, 1914, and by a further subsequent expropriation, expropriated about 24 1-10 acres of the 42.75 acres, the property of the suppliant, leaving him the owner of only about 18¾ acres.

The claim of the suppliant is that at the time he became the owner of the said lands there were situate thereon valuable deposits of sand and clay suitable for the manufacture of a very high class of brick-tile and analogous articles.

His claim is that the parts of his lands so taken are of such extent and so situate north with regard to the remainder thereof, and the remainder of his lands are so affected by the works and operations of the Trent Canal and the Canadian Northern Rail-

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way Co., as to render the same of no value for the purposes of the suppliant.

The suppliant's claim is, that the value of the lands to him at the time they were expropriated was the sum of $300,000, and he claimed the sum of $300,000, as damages and compensation.

At the opening of the case at the trial Counsel for the suppliant asked for and obtained leave to amend by reducing his claim to the sum of $100,000.

The Crown offered and still offers the sum of $30 per acre as full compensation for the lands expropriated, and any damages, and Counsel for the suppliant admit that this amount is ample compensation if the claim for special damage is disallowed. The suppliant had paid $10 per acre for the lands.

The trial of the petition was before me at Toronto on January 15 and 16, 1917.

A considerable amount of evidence was adduced, and written arguments were to be furnished.

Subsequently, and prior to any arguments being filed the Crown pursuant to the provisions of the statute in that behalf abandoned certain portions of land previously expropriated.

It should be stated that owing to the construction of the Trent Canal it became necessary to divert the line of the Canadian Northern Railway, and for this purpose 3.73 additional acres of the property owned by the suppliant were expropriated by the Crown.

The effect of this abandonment by the Crown was to entirely change the nature of the claim put forward by the suppliant in his original pleadings and of the evidence adduced at the trial.

The Crown made an application for a new trial based on allegations of surprise at the former trial and other reasons, and after considering the facts

alleged and taking into consideration the complete change effected by the abandonment, an order was made granting the application for a new trial, the Crown paying the costs of the suppliant up to that date between solicitor and client.

After this abandonment the position of matters was as follows: Out of the 42.75 acres owned by the suppliant, 9.63 acres were expropriated for the area of the canal, and 3.73 acres for the new line of the Canadian Northern Railway, in all 13.36 acres of the 42.75 acres, leaving the suppliant 29.39 acres.

The Crown is the legal owner of the former right of way of the Canadian Northern Railway, and by the amended statement of defence, and also through counsel at the trial has offered to convey to the suppliant in fee simple that portion of the lands formerly owned by the Canadian Northern Railway containing 5.91 acres which added to the 29.39 acres of the suppliant, would increase his holding to 35.30 acres as against the 42.75 acres originally owned by the suppliant, or in other words reducing his ownership by 7.45 acres.

I may mention that the land taken for the canal is to a very great extent swamp land not suitable for the alleged purpose for which the suppliant alleges the lands were adapted, viz., brick, etc.

In the amended reply of the suppliant filed after the amended defence of the Crown, it is stated, as follows:

"5. In the process of the manufacture of brick "tile and analogous articles which the suppliant pro- "posed to carry on upon the said east half of said lot "eleven as alleged in the petition of right herein, the "sand and clay were to be used generally in the pro-

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"portions of about 92 per centum of sand to about 8 "per centum of clay, and the deposits of these "materials on his said land were originally in nearly "these respective proportions.

"6. There was no other available deposit of clay "suitable for the suppliant's said purposes known to "exist in Ontario up to the time of the first exprop- "riation of the suppliant's said lands or since and "so much of the deposit of clay aforesaid to wit: "Area 90 per centum thereof was on lands still "retained by the respondents thus being lost to the "suppliant that this loss to the suppliant of his sup- "ply of clay makes it impossible to successfully "carry on the proposed enterprise.

"7. So great a quantity of the said deposit of "sand has been lost to the suppliant by reason of "the matters set out herein and in the petition of "right aforesaid that there is not sufficient thereof "remaining even after the said abandonment to "justify the expense of the construction of the works "which the suppliant proposed to place upon the "said lot as the engaging in the suppliant's pro- "posed enterprise."

I quote these paragraphs from the suppliant's amended reply as to my mind they are of considerable importance in considering the case presented by him. He has been represented through the case by very able counsel who has been indefatigable in the labour bestowed upon the conduct of the case and in the very exhaustive and able argument furnished to me. The allegations are made after an opportunity of considering the evidence adduced at the first trial.

At the first trial the case put forward was that the materials were suitable for the manufacture of face brick of a very high quality requiring 92 per centum of sand and 8 per centum of clay. On the second trial the manufacture of tiles was introduced, which would require about 80 per centum of clay.

The case came on before me at Toronto on January 14, 1919, and subsequent days, and subsequently additional evidence was adduced at Ottawa.

It was agreed by Counsel that all the evidence adduced at the first trial should be received as if given at the second trial.

This mass of evidence and the voluminous arguments of Counsel I have carefully considered and analyzed.

It is impossible for me to set out in detail these reasons and to pass comments on each exhibit produced.

It must be borne in mind that there has been no established business carried on upon the premises in question.

The evidence of supposed profits to be derived from the premises by the manufacture of brick, etc., is purely conjectural.

Evidence was tendered by the suppliant to show what the value of the property might be to him if he were able to manufacture the quantity of brick estimated, and of the quality claimed by him, and saleable f.o.b. at Washago at the enormous profit claimed.

It would not be difficult to procure numerous investors such as Eckhardt to advance large sums of money towards the formation of a company if they were guaranteed the large profit claimed.

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In my opinion, however, after hearing all the evidence and again carefully considering the same the hopes of the petitioner are purely nebulous.

The Solicitor General in his argument refrained from accusing the petitioner of any intent to defraud. He charitably characterized the petitioner as being obsessed with his idea. This may be so. I refrain from expressing any more unfavourable view.

At the trial the petitioner claimed that there was a sufficient quantity of sand and clay upon the premises prior to the expropriation to enable him to produce from 245,000,000 to 250,000,000 bricks sufficient to carry on the enterprise for a period of 35 years.

His contention is that for a million bricks 4000 cubic feet of clay would be required. If this were so for 245,000,000 bricks there would be required 980,000 cubic feet of clay.

Dealing with the state of matters after the amended defence of the Crown, and the offer to convey the greater portion of the lands primarily occupied by the Canadian Northern Railway, there remains notwithstanding the allegation in the suppliant's amended reply more than a sufficient quantity of sand.

At the opening of the case *Mr. Mackay,* Counsel for the suppliant, stated as follows:

"The question which will arise now is this. The "Crown will say we have abandoned to you a large "part of the land on which are your materials. We "will say, you have abandoned to us sufficient sand "or almost sufficient for our purposes."

As to the clay, at the trial Beharriell states that he is left with only 300,000 cubic feet of clay.

Connor, a witness for the suppliant, places the clay available now at 20,000 cubic yards, equal to 540,000 cubic feet, instead of 300,000 cubic feet as stated by the suppliant, a supply sufficient for over 20 years.

Connolly, a witness for the suppliant, places the clay available at 580,000 cubic feet.

John S. McLeod places the available clay at 34,000 cubic yards of clay amounting to 918,000 cubic feet of clay.

I am of opinion that the evidence of Mr. Hice should be accepted. He is a gentleman of very high standing and of great experience, and his statement that there is no peculiar value in the particular clay from these premises is, I think, correct.

Beharriell, the suppliant, in his evidence at the first trial, was questioned as follows:

"HIS LORDSHIP—Did you send samples of the sand "to Toledo?—A. I did, sir.

"Q. Did you send samples of the sand alone?— "A. I made shipments of sand and clay.

"Q. Did you send shipments of sand alone?—A. "I may have done that. It is a long time ago. I "can scarcely remember that. I have some bills of "lading here.

"Q. I would like to know if you can remember "whether you sent these shipments of sand alone 'without the rock and clay or whether you always "sent samples of sand rock and clay together.—A. "I did not send clay, there was so little required but "I have sent sand alone."

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If there were any peculiar merit in the clay as the suppliant contends, at the enormous profits he hopes to realize, he has enough clay to realize a fortune and if short could always supplement it.

Of sand he has abundance. In addition to the statement of Counsel to which I have referred, I quote from the suppliant's evidence:

"Q. Then you have an abundance of sand?—A. "A fair amount of sand.

"Q. More than you will ever use in a number of "lives to come?—A. You are quite right."

The contention of the suppliant that a mixture of sand of 92 per centum with clay of 8 per centum would form a commercial brick is absolutely disproved by the evidence.

There would be no bond without the admixture of other ingredients such as lime, etc.

This is demonstrated by the experiments of the suppliant himself.

On the whole case I am of opinion that the suppliant has failed entirely to prove that he has suffered any injury to any feasible commercial undertaking by him.

The offer of the Crown is ample.

The suppliant must pay the costs of the action subsequent to the filing of the amended defence of the Crown. These costs should not include any of the evidence or costs of the first trial.

The suppliant is entitled to a conveyance of the lands offered by the Crown.

The quantity of land expropriated can no doubt be arrived at by Counsel. *Judgment accordingly.*

Solicitor for plaintiff: *W. C. Mackay,* K. C.

Solictor for respondent: *F. G. Evans.*